Supreme Court, U.S.
FILED

941095 DEC 20 1994

No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1994

NELDA ENRIQUEZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

CHARLES W. B. FELS
Counsel of Record
Post Office Box 1126
Knoxville, TN 37901-1126
(615) 637-0661
Counsel for Nelda Enriquez

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

49 pp

QUESTION PRESENTED

DOES THE CONFRONTATION CLAUSE OF THE SIXTH AMENDMENT AS DEFINED BY *BRUTON V. UNITED STATES* AND *CRUZ V. NEW YORK* EXCLUDE ADMISSION OF INCRIMINATING STATEMENTS MADE BY A NONTESTIFYING CODEFENDANT WHOSE STATEMENTS ARE PART OF SURREPTITIOUSLY RECORDED CONVERSATIONS BETWEEN THE CO-DEFENDANT AND THE DEFENDANT.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

ARGUMENT 6

THE INCRIMINATING STATEMENTS OF THE NONTESTIFYING CODEFENDANT SHOULD HAVE BEEN EXCLUDED FROM EVIDENCE BECAUSE THE CODEFENDANT WAS NOT PRESENT FOR CROSS EXAMINATION AND BECAUSE THE JURY SHOULD NOT HAVE BEEN EXPECTED TO FOLLOW THE TRIAL COURT'S INSTRUCTION TO DISREGARD HIS STATEMENTS AS FACTUAL EVIDENCE AGAINST THE DEFENDANT 6

A. The Confrontation Clause As Defined By *Bruton v. United States* And *Cruz v. New York* Exclude Admission Of Incriminating Statements Made By A Nontestifying Codefendant 6

B. The Circuit Courts Have Admitted Similar Evidence In The Past But Have Never Determined The Applicability Of *Bruton* And *Cruz* To The Incriminating Statements Of A Nontestifying Codefendant 11

CONCLUSION 14

TABLE OF CONTENTS – Continued

Page

APPENDIX

Order of the Sixth Circuit Court of Appeals on the Speedy Trial Issue, dated January 24, 1994..... 1a

Opinion of the Sixth Circuit Court of Appeals, dated August 23, 1994..... 5a

Order on Petition to Rehear, dated September 22, 1994 ..... 26a

Excerpts from Trial Transcripts..... 27a

TABLE OF AUTHORITIES

Page

I. CASES

Bruton v. United States, 391 U.S. 123 (1968) ..... *passim*

California v. Green, 399 U.S. 149 (1970) 7

Cruz v. New York, 481 U.S. 186 (1987) ..... *passim*

Krulewitch v. United States, 336 U.S. 440 (1949) 13

Parker v. Randolph, 442 U.S. 62 (1979) 7

People v. Aranda, 407 P.2d 265 (Cal. Supr. Ct. 1965) 9

Pointer v. Texas, 380 U.S. 400 (1965) 6

Richardson v. Marsh, 481 U.S. 200 (1987) ..... *passim*

Simmons v. South Carolina, 512 U.S. ___, 129 L.Ed.2d 133, 114 S.Ct. ___ (1994) 7

Tennessee v. Street, 471 U.S. 409 (1985) 7

United States v. Abrahamson, 568 F.2d 604 (8th Cir. 1978) 12

United States v. Davis, 890 F.2d 1373 (7th Cir. 1989) 11

United States v. Gutierrez-Chavez, 842 F.2d 77 (5th Cir. 1988) 12

United States v. Jordan, 810 F.2d 262 (D.C. Cir. 1987) 11

United States v. Lemonakis, 485 F.2d 941 (D.C. Cir. 1973) 11, 12

United States v. McDowell, 918 F.2d 1004 (1st Cir. 1990) 12

TABLE OF AUTHORITIES – Continued

Page

United States v. Murray, 618 F.2d 892 (2nd Cir. 1980) 12

United States v. Price, 792 F.2d 994 (11th Cir. 1986) 12

United States v. Stelten, 867 F.2d 453 (8th Cir. 1988) 11

United States v. Whitman, 771 F.2d 1348 (9th Cir. 1985) 12

United States v. Williams, 604 F.2d 1102 (8th Cir. 1979) 11

II. STATUTE

28 U.S.C. § 1254(1) 2

III. CONSTITUTIONAL PROVISION

U.S. Constitution, Amendment VI ..... *passim*

No. _____

In The

Supreme Court of the United States

October Term, 1994

NELDA ENRIQUEZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner Nelda Enriquez respectfully prays that a writ of certiorari issue to review the opinion of the Court of Appeals for the Sixth Circuit entered August 23, 1994, and the denial of the petition to rehear that was entered on September 22, 1994.

OPINIONS BELOW

The Order of the Sixth Circuit Court of Appeals on the Speedy Trial issue, dated January 24, 1994, is reprinted in the appendix at 1a - 4a.

The opinion of the Sixth Circuit Court of Appeals, dated August 23, 1994, is reprinted in the appendix at 5a-25a.

The Order of the Sixth Circuit Court of Appeals denying the petition for hearing, dated September 22, 1994, is reprinted in the appendix at 26a.

JURISDICTION

The opinion of the Sixth Circuit was entered on August 23, 1994. The petition to rehear was denied in an order dated September 22, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Constitution, Amendment VI.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

STATEMENT OF THE CASE

Petitioner Nelda Enriquez was convicted in federal district court of conspiring to distribute and aiding and abetting the distribution of 479 grams of cocaine after a jury was allowed to listen to tapes containing the incriminating statements of a nontestifying male codefendant who surreptitiously recorded conversations with her after the charged conspiracy had terminated.

As the jury listened to the taped conversations, they heard the nontestifying codefendant make statements to the effect (1) that the defendant had been involved in drugs in the past, (2) that she was owed a large sum of money by the codefendant, (3) that she had been told about the failure of other codefendants to return with his money, and (4) that he was attempting to engage her in future drug transactions[1].

All of the conversations between the nontestifying codefendant and the defendant took place between July 2, 1992 and July 13, 1992, well after the charged conspiracy terminated on June 10, 1992.

The Government moved to introduce the tapes through an F.B.I. agent rather than through the codefendant because the codefendant fled and was not present at trial.[2] Counsel objected to the admission of the tapes

---

[1] Complete transcripts of the five conversations the jury was allowed to hear are reprinted in the appendix of this petition. The key statements by the nontestifying codefendant have been italicized.

[2] There was no evidence of any kind that the female defendant was responsible for this absence.

through the agent on the basis that allowing the jury to hear the codefendant's portions of the conversations without him present for cross examination violated Ms. Enriquez's Sixth Amendment right to confront him. Following a hearing out of the presence of the jury, the trial court found the tapes admissible and said:

> I will admit all the tapes because the voice of the defendant was recognized by this witness [the agent]. When the tapes are played, I will give instructions that the [absent codefendant] Dadinis part of the conversation is not admissible for the truth of the contents therein, but only to show the context of the answers. I will give that on each occasion, not on each occasion, maybe, but regularly throughout the trial. I find that the tapes are admissible.

When the time came for the tapes to be played for the jury, the trial court instructed the jury to rely on the absent codefendant's comments in order to make sense of the defendant's responses but to disregard his statements as factual evidence:

> Since [the absent codefendant] Dadinis is not here, as far as his wording on the tape, it is hearsay and would normally not be admissible; *it might very well be the truth*; it might be a *mistake*; it might be a *lie*, or a *subterfuge* put on the tape, but you are allowed to listen to the tape for the sole purpose of putting the answers in context. Do you understand that? You can't take his questions as truth, as proof of the truth of the contents of those statements, but you take them to provide the context of the answers. All right. (emphasis added)

The tape recordings of these conversations were the principal evidence that linked Ms. Enriquez in Texas to a conspiracy to distribute cocaine in Tennessee.[3]

Ms. Enriquez appealed her conviction to the United States Court of Appeals for the Sixth Circuit. The Sixth Circuit affirmed her conviction with the following observation about the confrontation issue:

> The district court explicitly charged the jury not to take Dadinis' statements as true and to consider them only for the purpose of placing Ms. Enriquez's statements in context. Because Mr. Dadinis' statements were not offered for the truth thereof, there is no hearsay or confrontation problem.

Ms. Enriquez petitions the United States Supreme Court to recognize that allowing the jury to listen to the incriminating statements of the absent codefendant:

> (1) constituted a violation of Ms. Enriquez's Sixth Amendment right to confront her accuser, and
>
> (2) carried such a risk that the violation could not be remedied by instructing the jury to disregard the absent codefendant's statements as factual evidence.

---

[3] Aside from the tape recordings, the Government introduced controverted testimony regarding a post-arrest interview and items that were confiscated from her home 35 days after the conspiracy ended. The items included 4.1 kilograms of cocaine, 40 pounds of marijuana, 2 bottles labeled valium, 2 pistols, 2 scales, and $1,387.

ARGUMENT

THE INCRIMINATING STATEMENTS OF THE NONTESTIFYING CODEFENDANT SHOULD HAVE BEEN EXCLUDED FROM EVIDENCE BECAUSE THE CODEFENDANT WAS NOT PRESENT FOR CROSS EXAMINATION AND BECAUSE THE JURY SHOULD NOT HAVE BEEN EXPECTED TO FOLLOW THE TRIAL COURT'S INSTRUCTION TO DISREGARD HIS STATEMENTS AS FACTUAL EVIDENCE AGAINST THE DEFENDANT.

A.

The Confrontation Clause As Defined By *Bruton v. United States* and *Cruz v. New York* Exclude Admission Of Incriminating Statements Made By A Nontestifying Codefendant.

Allowing the jury to listen to the incriminating statements of the nontestifying codefendant violated Nelda Enriquez's rights under the Sixth Amendment because the codefendant was not available for cross examination and because the jury should not have been expected to follow the trial court's instruction to disregard his statements as factual evidence against Ms. Enriquez.

"The Confrontation Clause of the Sixth Amendment guarantees the right of a criminal defendant 'to be confronted with the witnesses against him.' " *Cruz v. New York*, 481 U.S. 186, 189 (1987) "The right of confrontation includes the right to cross-examine witnesses." *Richardson v. Marsh*, 481 U.S. 200, 206 (1987) (citing *Pointer v. Texas*, 380 U.S. 400, 406-407 (1965)).

Allowing the defendant to confront and cross-examine witnesses:

> (1) insures that the witness will give his statements under oath – thus impressing him with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury;
>
> (2) forces the witness to submit to cross-examination, the 'greatest legal engine ever invented for the discovery of truth'; and
>
> (3) permits the jury that is to decide the defendant's fate to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility.

California v. Green, 399 U.S. 149, 158 (1970) (quoting 5 Wigmore § 1367).

Courts often seek to avoid encroaching upon a defendant's rights under the confrontation clause by instructing juries to disregard inadmissible hearsay evidence. *See Richardson v. Marsh*, 481 U.S. 200 (1987); *Tennessee v. Street*, 471 U.S. 409 (1985); and *Parker v. Randolph*, 442 U.S. 62 (1979). But,

> "there are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored."

Bruton v. United States, 391 U.S. 123, 135 (1968), *quoted in Simmons v. South Carolina*, 512 U.S. ___, 129 L.Ed.2d 133, 147, 114 S.Ct. ___ (1994); and *Cruz v. New York*, 481 U.S. 186, 190 (1987).

Bruton v. United States, 391 U.S. 123 (1968) and *Cruz v. New York*, 481 U.S. 186 (1987) are cases in which the

defendant's rights under the confrontation clause were violated when inadmissible hearsay evidence from a co-defendant was admitted, despite the court's instruction to the jury to disregard the evidence. In *Bruton*, the Supreme Court held that the Sixth Amendment prohibits the admission of a nontestifying codefendant's incriminating pretrial confession at a joint trial of the defendant and the codefendant who gave the confession. In *Cruz*, the Supreme Court (relying upon *Bruton*) said that "where a nontestifying codefendant's confession incriminating the defendant is not directly admissible against the defendant, the Confrontation Clause bars its admission at their joint trial, *even if the jury is instructed not to consider it against the defendant*, and *even if the defendant's own confession is admitted against him.*" *Cruz v. New York* at 193. (emphasis added) In both *Bruton* and *Cruz*, the reason for barring the admission of the evidence was this Court's fear that the evidence was so incriminating that the jury could not be expected to follow the court's instruction to disregard the evidence.

This Court, in *Cruz*, emphasized three factors important to determining when a defendant's Sixth Amendment rights have been violated under *Bruton*:

> . . . the likelihood that the instruction will be disregarded, *Bruton* 391 US, at 135, 20 L.Ed.2d 476, 88 S Ct 1620; the probability that such disregard will have a devastating effect, *id.*, at 136, 20 L.Ed. 2d 476, 88 SCt 1620; and the determinability of these facts in advance of trial. *Richardson v. Marsh*, post, at 208, 95 L.Ed. 2d 176, 107 S.Ct 1702.

Cruz v. New York at 193.

Nelda Enriquez's case is indistinguishable from *Bruton* and *Cruz* in these three respects.[4] First, the jury could scarcely be expected to follow the instruction to ignore the codefendant's statements as factual evidence against Ms. Enriquez. The highly incriminating nature of the codefendant's statements made them exceptionally difficult to ignore. Moreover, the instruction was necessarily confusing, commanding the jury, in one breath, to consider the codefendant's words in order to place Ms. Enriquez's comments in context, and, in the next breath, to disregard his statements as factual evidence against Ms. Enriquez. As the Supreme Court has said:

> "A jury cannot segregate evidence into intellectual boxes. . . . It cannot determine that a confession is true insofar as it admits that A has committed criminal acts with B and at the same time effectively ignore the inevitable conclusion that B has committed those same criminal acts with A."

Bruton v. United States, 391 U.S. 123, 131 (1968) (quoting *People v. Aranda*, 407 P.2d 265, 272 (Cal.Supr.Ct. 1965)).

Second, disregarding the Court's instruction to ignore the codefendant's statements as factual evidence would have been devastating to Ms. Enriquez's case. The codefendant's statements " 'expressly implicated' " Ms.

---

[4] The only difference between Ms. Enriquez's case and the *Bruton* and *Cruz* cases is that the codefendant's statements incriminating Ms. Enriquez were made during the course of secretly taped conversations between the codefendant and Ms. Enriquez. In *Bruton* and *Cruz*, the codefendant's incriminating statements were made as part of pretrial confessions.

Enriquez as a coconspirator in the conspiracy to distribute cocaine; thus, "there was not the slightest doubt that [the codefendant's statements] would prove 'powerfully incriminating.' " *Richardson v. Marsh*, 481 U.S. 200, 208 (1987) (quoting *Bruton v. United States*, at 124, n.1, and 135).

Third, the likelihood that the jury might disregard an instruction to ignore the codefendant's statements and the danger associated with the jury's possible disregard of the instruction were both evident to the trial court prior to trial. The court reviewed the codefendant's statements during a hearing out of the presence of the jury and was therefore aware that the codefendant's statements were "incriminating on [their] face" and would have a devastating effect if considered by the jury. *Richardson v. Marsh*, 481 U.S. 200, 208 (1987) (distinguishing *Bruton* by explaining that codefendant's confession was not incriminating until after it was linked with evidence introduced later at trial).

The jury should not have been allowed to listen to the codefendant's statements. His statements were not admitted under oath. He was not present for cross examination. The jury was not allowed to observe his demeanor or assess his credibility. The instruction to the jury to accept his statements for one purpose and ignore his statements for another purpose contained contradictory commands and was thus difficult to understand and follow. And the statements were so powerfully incriminating that the jury should not have been expected to follow the court's instruction to disregard the statements. Thus, Ms. Enriquez's Sixth Amendment rights as defined

in *Bruton v. United States* and *Cruz v. New York* were violated.[5]

B.

The Circuit Courts Have Admitted Similar Evidence In The Past But Have Never Determined The Applicability of *Bruton* And *Cruz* To The Incriminating Statements Of A Nontestifying Codefendant.

The United States Courts of Appeal have previously ruled that the incriminating statements of nontestifying third parties are admissible so long as the jury is instructed to disregard the statements as factual evidence against the defendant.

In the majority of the Courts of Appeal decisions, the nontestifying third party was someone other than a ***codefendant***. *See United States v. Davis*, 890 F.2d 1373, 1379-80 (7th Cir. 1989) (conversations with a cooperating witness); *United States v. Stelten* 867 F.2d 453, 454 (8th Cir. 1988) (conversations with a paralegal); *United States v. Williams*, 604 F.2d 1102, 1118 (8th Cir. 1979) (conversation with a police officer); *United States v. Jordan*, 810 F.2d 262, 264 (D.C.Cir. 1987) (conversations with an informant); *United States v. Lemonakis*, 485 F.2d 941, 948 (D.C.Cir. 1973) (conversations with a police officer/cooperating

---

[5] The fact that the defendant may have made statements during the course of her conversations with the codefendant that confirmed the codefendant's own statements only exacerbates the confrontation clause problem: "In such circumstances a codefendant's confession that corroborates the defendant's confession significantly harms the defendant's case." *Cruz v. New York*, at 192.

witness); *United States v. Price*, 792 F.2d 994, 996-997 (11th Cir. 1986) (conversations with a confidential informant); *United States v. Whitman*, 771 F.2d 1348, 1352 (9th Cir. 1985) (conversations with an informant); *United States v. Murray*, 618 F.2d 892, 900 (2nd Cir. 1980) (conversations with a cooperating witness); *United States v. Abrahamson*, 568 F.2d 604, 606 (8th Cir. 1978) (conversations with law enforcement agents).

All of these cases relied upon the seminal case of *United States v. Lemonakis*, 485 F.2d 941, 948 (D.C.Cir. 1973), which reasoned that a nontestifying third party's inadmissible hearsay statements become admissible nonhearsay statements once the jury is instructed that the statements are not being offered for their truth. This reasoning has led the Courts to further determine that once the statements of the third party were deemed admissible nonhearsay evidence, the defendant has no Sixth Amendment right to confront the third party.

Three circuits, including the Sixth Circuit in Ms. Enriquez's case, have sought to extend *Lemonakis* to admit the incriminating statements of a nontestifying ***codefendant***. See *United States v. McDowell*, 918 F.2d 1004 (1st Cir. 1990) and *United States v. Gutierrez-Chavez*, 842 F.2d 77, 81 (5th Cir. 1988). Yet, none of these have addressed the question presented in *Bruton* and *Cruz* of whether the limiting instruction is "an adequate substitute for petitioner's constitutional right of cross examination." *Bruton* at 137.

The flaw in the courts' analyses in *United States v. McDowell*, *United States v. Gutierrez-Chavez*, and this case is that the courts have "naively assumed" that jurors can always be expected to follow the court's instruction to

disregard the statements of a codefendant as factual evidence. But as this Court has said:

> 'The naive assumption that prejudicial effects can [always] be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction.'

Bruton v. United States at 129 and 135 (quoting *Krulewitch v. United States*, 336 U.S. 440, 453 (1949)).

This fiction is particularly unmitigated where as here the missing declarant is a named codefendant in the case.

Unless this Court chooses to say otherwise, *Bruton* and *Cruz* teach us that the statements of the codefendant in the present case were admitted into evidence in violation of important and well settled principles that guarantee an American citizen the right to confront her accuser.

CONCLUSION

Ms. Enriquez respectfully requests this Court to grant the petition for certiorari and to set aside her conviction on the ground that the admission of tape recorded statements by a nontestifying codefendant, even with a cautionary instruction, violates the Confrontation Clause of the Sixth Amendment.

Respectfully submitted,

CHARLES W.B. FELS
Counsel of Record
RITCHIE, FELS & DILLARD, P.C.
606 West Main Avenue
P. O. Box 1126
Knoxville, TN 37901-1126
(615) 637-0661
Attorney for Petitioner

No. 93-5304

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. NELDA ENRIQUES, Defendant-Appellant.	ORDER (Filed Jan. 24, 1994) **NOT RECOMMENDED FOR FULL-TEXT PUBLICATION** **Sixth Circuit Rule 24 limits citation to specific situations. Please see Rule 24 before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court.** ***This notice is to be prominently displayed if this decision is reproduced.***

BEFORE: MERRITT, Chief Judge, and NELSON and BOGGS, Circuit Judges.

Defendant-appellant Nelda Enriques filed an appeal of her conviction and sentence raising thirteen assignments of error, including an alleged Speedy Trial Act violation which is addressed by this Order. Having heard oral argument on these issues, we find that we are unable adequately to review the Speedy Trial issue on the record before us. We therefore make a partial remand of the case to the district court for factual findings as to the Speedy Trial Act issue, while retaining jurisdiction of the case insofar as the remaining issues raised by Ms. Enriques are concerned.

An indictment was filed in June, 1992 against five defendants (not including Ms. Enriques) for violations of federal narcotics laws. Ms. Enriques was arrested on July 16, 1992. On August 6, 1992, a superseding indictment was filed adding Ms. Enriques as a defendant along with the five co-defendants in the original indictment. Enriques first appeared before the district court in Tennessee on August 21, 1992, and her trial began on November 30, 1992.

Prior to trial, on October 6, 1992, the district court granted a government motion for extension of time under 18 U.S.C. § 3161(h)(7) of the Speedy Trial Act. In computing the Speedy Trial time limit, subsection (h)(7) excludes "[a] reasonable period of delay when the defendant is joined for trial with a co-defendant as to whom the time for trial has not run and no motion for severance has been granted." 18 U.S.C. § 3161(h)(7). In its order, the district court did not specify which co-defendant it was referring to or why the status of a co-defendant's case warranted an extension. The order consisted only of a standard form on which the district court circled the language of subsection (h)(7).

On November 13, 1992, Ms. Enriques filed a motion to dismiss based on the Speedy Trial Act. The district court took up the motion on the first day of trial. Counsel for Ms. Enriques requested that a record be made regarding the court's order excluding time attributable to co-defendants. Counsel pointed out that the court had not made any factual determination regarding the co-defendant to whom the order referred or regarding anything in a co-defendant's case that might warrant an extension of time. Counsel also reminded the court that Ms. Enriques

had been the last co-defendant indicted. The court first responded that its order had a factual basis attached to it, and then stated that the factual basis was in the record. When Enriques' counsel asked the court to specify the co-defendant by name, the court could not do so, but merely stated that it did not matter that Ms. Enriques was the last co-defendant indicted. On that basis, the court denied Ms. Enriques' Speedy Trial motion without an evidentiary hearing.

On appeal, Enriques argues that the 70-day Speedy Trial period expired on October 30, 1992, and therefore that the district court erred in refusing to grant her motion to dismiss the indictment. As an alternative to dismissal, she requests that the case be remanded to the district court for an evidentiary hearing to determine whether or not a factual basis existed for the court's extension of time. The government admits in its brief and at oral argument that the court's order is unclear, but argues that the trial court is not required to make findings under § 1361(h)(7).

The district court is required, upon motion and proof by the defendant, to dismiss an indictment if the defendant is not brought to trial within the 70-day time limit as extended by subsection (h). 18 U.S.C. § 3162(a)(2). Without a proper exclusion or extension of time, Enriques was not tried within the time limit. It is therefore crucial to determine whether the extension of time granted by the district court was proper. If improper, § 3162(a)(2) requires dismissal of the indictment.

The district court did not state with sufficient particularity the basis for the extension of time. The district

court identified the section of the statute that was said to control, but in its colloquy with Ms. Enriques' counsel the court did not specify a co-defendant, a pending pretrial motion, a problem with a co-defendant's representation, or any other valid basis for granting an extension of time. In its brief the government suggests in a footnote that other co-defendants had applied for and received continuances and extensions. However, the order cited by the government is the same extension that is now at issue.

We therefore **REMAND** the case to the district court for factual findings as to why § 3161(h)(7) applies. If it is shown that the court's order has a proper factual basis, we shall then consider the remaining issues raised by Ms. Enriques. Should the district court conclude that there is no factual basis for its initial order, the indictment must be dismissed pursuant ot 18 U.S.C. § 3162.

It is so ordered.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Clerk

No. 93-5304

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE.
	(Filed Aug. 23, 1994)
UNITED STATES OF AMERICA, Plaintiff-Appellee, v. NELDA ENRIQUES, Defendant-Appellant.	NOT RECOMMENDED FOR FULL-TEXT PUBLICATION Sixth Circuit Rule 24 limits citation to specific situations. Please see Rule 24 before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court. This notice is to be prominently displayed if this decision is reproduced.

BEFORE: MERRITT, Chief Judge, and **NELSON** and **BOGGS,** Circuit Judges.

PER CURIAM. This is an appeal from a conviction and sentence in a cocaine distribution case. The defendant urges us to reverse her conviction because of alleged violations of the Speedy Trial Act and the Jencks Act, allegedly prejudicial comments by the trial judge, and various alleged evidentiary errors. She challenges her

sentence on the basis of an alleged misapplication of the sentencing guidelines.

After hearing oral argument, we remanded the Speedy Trial Act issue. The district court held a hearing and subsequently entered an order and memorandum resolving the issue in favor of the government. The parties have now favored us with supplemental briefs on the Speedy Trial Act question, and the case is ripe for decision. For the reasons that follow, we shall affirm both the conviction and the sentence.

I.

Early in June of 1992, acting on a tip that a cocaine delivery was about to occur in Crossville, Tennessee, FBI Special Agent Clyde Merryman began investigating the activities of the suspected buyer, Billy Garrett, Jr. On June 9, 1992, Agent Merryman observed a meeting between Mr. Garrett and his drug suppliers, Christopher Kennedy and Wade Gilbert, both of Houston, Texas. Merryman and several other agents confronted the group at this time.

After telling Mr. Garrett of the informant's tip, Agent Merryman advised him of his *Miranda* rights and asked if he were [sic] willing to cooperate in the ongoing investigation. Mr. Garrett decided to cooperate with the agents, as did Kennedy and Gilbert. When asked if there were [sic] any money in his vehicle, Mr. Kennedy helped agents recover $5000 in cash from his pickup truck. Approximately half a kilogram of cocaine was recovered from Mr. Garrett's pickup truck.

Kennedy and Gilbert signed confessions stating that the cocaine had been supplied in Texas by men named "Tommy" and "Andy." These individuals were later identified as Thomas Thompkins and Harris Andy Dadinis. Kennedy and Gilbert were formally arrested on June 12, 1992, and were released on their own recognizance with instructions to return to Houston to assist the FBI there. They were subsequently indicted in the Middle District of Tennessee.

In the course of the Houston investigation, which was coordinated by FBI Special Agent Jennifer Brown, both Kennedy and Gilbert voluntarily engaged in tape-recorded telephone conversations with targets of the investigation. Through these tape recordings, the FBI was able to confirm that the cocaine seized in Tennessee came from Thomas Thompkins and Andy Dadinis. Thompkins and Dadinis were arrested in Houston on June 30, 1992.

Through Thompkins, police learned that Dadinis had obtained the cocaine from a person named "Nelda." Dadinis identified this person as Nelda Enriques, the defendant herein, and Dadinis agreed to participate in monitored telephone conversations with her. He also wore a hidden recorder at meetings with Ms. Enriques in her residence in Houston.

Based upon the information gathered in its investigation, the government sought to have Nelda Enriques added to the indictment. Special Agent Brown obtained an arrest warrant and a search warrant for Ms. Enriques' house, and on July 16, 1992, agents went to her house, arrested her, advised her of her *Miranda* rights, and searched the premises. There they found a total of 9.9

pounds (4.5 kilograms) of cocaine and 48.54 pounds of marijuana. They also recovered a semi-automatic handgun, a digital beeper, scales used for weighing drugs, and records containing evidence of drug transactions.

Ms. Enriques was taken to the FBI office to be booked and fingerprinted. On the way to the office she initiated a discussion of the case with Agent Brown. Agent Brown advised her of her *Miranda* rights again once they had reached the office. Ms. Enriques said that she understood her rights, and she signed an advice-of-rights form in which she acknowledged that her subsequent statements would be made voluntarily. After signing the form Ms. Enriques admitted to Agent Brown that she had sold the cocaine that was eventually transported to Tennessee.

In due course Ms. Enriques was added to the indictment in the Middle District of Tennessee. The charges against her were (1) conspiracy to distribute cocaine and (2) aiding and abetting her co-defendants' possession of cocaine with intent to distribute it, in violation of 21 U.S.C. §§846 and 841(a)(1), respectively. On August 28, 1992, she entered a plea of not guilty. Her trial – which was eventually severed from the trial of her co-defendants – began on December 2, 1992. Two weeks before the start of the trial Ms. Enriques moved for acquittal on Speedy Trial Act grounds. The court denied the motion, stating that the trial could properly be delayed due to the joinder of a co-defendant.

At trial the government introduced all of the tape-recorded conversations, much of the evidence seized in the search of Ms. Enriques' house, and pictures of Mr. Dadinis entering and leaving the house. Mr. Dadinis

failed to appear as a witness, although called to do so, whereupon his bond was forfeited and a bench warrant was issued for his arrest. The court told the jury of Mr. Dadinis' non-appearance and gave several limiting instructions regarding the uses to which the jury might put his tape-recorded statements.

The jury found Ms. Enriques guilty of both of the charges against her. She was sentenced to imprisonment for 235 months, to be followed by five years of supervised release, and she was fined $20,000. Ms. Enriques then filed a timely appeal.

II.

A. The Speedy Trial Act

The defendant contends that her conviction is invalid because her trial did not begin within 70 days of August 21, 1992, the date of her first court appearance in Tennessee, as required by 18 U.S.C. §3161(c).[1] It is undisputed that the defendant's trial did not begin within the 70-day period. The district court granted an extension, however, pointing out that 18 U.S.C. §3161(h)(7) permits this in the event of delay caused by the joinder of a co-defendant for

---

[1] Section 3161(c)(1) provides, in pertinent part, as follows: "In any case in which a plea of not guilty is entered, the trial of a defendant charged in an . . . indictment with the commission of an offense shall commence within seventy days from the filing date (and making public) of the . . . indictment, or from the date the defendant has appeared before a judicial officer of the court in which such charge is pending, whichever date last occurs."

whom the speedy trial period has not yet run. This section provides, in relevant part:

> "(h) The following periods of delay shall be excluded . . . in computing the time within which the trial of any such offense must commence:
>
> * * *
>
> (7) A reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and no motion for severance has been granted."

Pressed by the defense to specify the grounds for the extension, the district court declined to do so and did not identify the particular co-defendant in question. On remand, however, the district court indicated that the period prior to September 29, 1992, had been excluded due to the joinder of co-defendant Tommy Thompkins.

Although co-defendant Thompkins was arrested in Houston on June 30, 1992, it was September 29, 1992, when he first appeared before a judicial officer in the Tennessee district court. Under 18 U.S.C. §3161(c), Thompkins' speedy trial time (and thus the defendant's time) presumably began to run following the latter event.

Noting that the term "delay" in paragraph 3161(h)(7) is qualified by the adjective "reasonable," Ms. Enriques argues that the delay in bringing Mr. Thompkins before the court in Tennessee was unreasonable and that her speedy trial clock began to run before Thompkins appeared in Tennessee. In this connection she cites subparagraph 3161(h)(1)(H), which provides that "delay

resulting from transportation of any defendant from another district" will be excluded from the time between that defendant's indictment and trial, but that "any time consumed in excess of ten days from the date [of] an order of removal or an order directing such transportation, and the defendant's arrival at the destination shall be presumed to be unreasonable."

As the district court observed, the delay in transporting Mr. Thompkins was not unreasonable under the circumstances. Mr. Thompkins apparently consented to removal at his detention/removal hearing in the District Court for the Southern District of Texas on July 6, 1992, and that court ordered that Thompkins be detained until trial. The court further ordered, it appears, that Mr. Thompkins be removed to the Eastern District of Texas for the processing of other charges against him prior to his removal to Tennessee. There is no indication in the record that the time spent in processing the charges in the Eastern District of Texas was unreasonable, and the statutory presumption does not apply to such activities. We conclude, therefore, that the district court's denial of Ms. Enriques' motion to dismiss was not erroneous.[2]

The defendant also points to the district court's failure to make an express finding, pursuant to 18 U.S.C.

---

[2] The district court's primary ground for rejecting Ms. Enriques' argument was that the exception clause of §3161(h)(1)(H) did not apply because the delay in transporting Thompkins, even if unreasonable, occurred before Thompkins' first appearance. We need not decide the validity of this rationale. Neither do we find it necessary to address the merits of an alternative analysis that was offered by the government in its supplemental brief on the speedy trial issue.

§3161(h)(8)(A), that the ends of justice served by delay outweighed the interests of the public and the defendant in a speedy trial. This subsection provides, in relevant part, that the district court may exclude

> "[a]ny period of delay resulting from a continuance granted by any judge on his own motion or at the request of the defendant or his counsel or at the request of the attorney for the Government, if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial. *No such period of delay resulting from a continuance granted by the court in accordance with this paragraph shall be excludable under this subsection unless the court sets forth, in the record of the case, either orally or in writing, its reasons for [so finding].*" (Emphasis supplied.)

It is clear from the record, however, that the judge did not purport to extend the time pursuant to subparagraph 3161(h)(8)(A). The exclusion of time for the joinder of a co-defendant pursuant to paragraph 3161(h)(7) is not a "continuance," and it does not require a subparagraph (h)(8)(A) finding.

B. Prejudice Issues

Ms. Enriques alleges that certain actions and statements by the trial court warrant reversal because they tended to "cast[] the government's lawyer in the role of the 'underdog.' " She contends that the court interfered with the defense's cross-examination of witnesses and

that the court regularly assumed the role of the prosecutor by interrogating witnesses. In so doing, says the defendant, the trial judge communicated to the jury that he favored a conviction.

Conceding that the district court was "strict" in managing the trial, the government maintains that the record as a whole reflects an orderly trial in which the court sought to ensure that "issues [were] not obscured and that the testimony [was] not misunderstood." See *United States v. Slone*, 833 F.2d 595, 597 (6th Cir. 1987). The government also notes that the trial judge is permitted to question witnesses for the purpose of eliciting the truth. *Id.*

The transcript of the trial reveals no serious transgression by the trial court, in our view; the court was simply trying to keep extraneous matters out of a complex trial and to encourage the orderly introduction of evidence.

The defendant also complains that she suffered prejudice because two jurors saw her in handcuffs while she was being transported from the jail to the courtroom. The incident occurred in the courthouse, but not in the courtroom itself. Defense counsel declined an opportunity to make inquiry of the jurors regarding the incident and did not request that a limiting instruction be given to the jury, so we review for plain error only. Cf. *United States v. Busacca*, 863 F.2d 433, 435 (6th Cir. 1988), *cert. denied*, 490 U.S. 1005 (1989); *United States v. Causey*, 834 F.2d 1277, 1283 (6th Cir. 1987), *cert. denied*, 486 U.S. 1034 (1988). A plain error is defined as "an egregious error, one that

directly leads to a miscarriage of justice." *Busacca*, 863 F.2d at 435.

This court has observed that incidents in which jurors view shackled criminal defendants for brief periods outside of the courtroom are less prejudicial than similar incidents occurring in the courtroom during trial. See *United States v. Barger*, 931 F.2d 359, 371 (6th Cir. 1991); *United States v. Crane*, 499 F.2d 1385, 1389 (6th Cir.), *cert. denied*, 419 U.S. 1002 (1974). Here the incident was a brief one and did not involve the entire jury. We think it most unlikely that any miscarriage of justice occurred.

C. Evidentiary Rulings

FBI Case Agent Brown testified, without leading by the prosecutor and without objection from the defendant, that Ms. Enriques had admitted certain aspects of her involvement in the cocaine transaction. The prosecutor followed up with more specific questions, each of which was posed in the context of Agent Brown's testimony that Ms. Enriques had confessed her involvement in the cocaine deal.

The defendant first argues that her statements should have been excluded as inadmissible hearsay. But Rule 801(d)(2), Fed. R. Evid., creates an exception to the hearsay rule for admissions of a party-opponent. The testimony as to what Ms. Enriques said during her interview was clearly admissible under this exception.

Second, the defendant objects to the testimony on the ground that it was evoked by leading questions. The trial

court had discretion to permit a certain amount of leading, however, and we see no abuse of that discretion here. See *Chonich v. Wayne County Community College*, 874 F.2d 359, 368 (6th Cir. 1989); *United States v. Shoupe*, 548 F.2d 636, 641 (6th Cir. 1977).

Ms. Enriques also objects to the introduction of tape-recorded conversations between the defendant and the missing co-conspirator, Andy Dadinis. The district court permitted the tapes to be played, over the defendant's objection, but gave a limiting instruction in which the jury was told that it could consider the statements of Mr. Dadinis only for the purpose of putting Ms. Enriques' statements in context.

As long as tape recordings are authentic and reliable, the decision to admit them into evidence rests in the sound discretion of the trial court. See *United States v. Robinson*, 707 F.2d 872, 876 (6th Cir. 1983). Here the defendant contends that the tapes did not meet the authentication and reliability criteria set forth in *United States v. McMillan*, 508 F.2d 101, 104 (8th Cir. 1974), *cert. denied*, 421 U.S. 916 (1975). *McMillan* held that admission of a tape recording is admissible when (1) the recording device was capable of accurately recording the conversation; (2) the operator of the device was competent to operate it; (3) the recording is authentic and correct; (4) changes, additions, or deletions have not been made; (5) the recording has been preserved in a manner shown to the court; (6) the speakers are identified; and (7) the conversation elicited was made voluntarily, in good faith, and without any kind of inducement. *Id.*

Based upon the testimony of the agent who had monitored Andy Dadinis, the district court concluded that the *McMillan* criteria were met. The defendant gives primary attention to the seventh element of the test, arguing that the recording was not voluntary because Mr. Dadinis only agreed to do it in the expectation that he would receive more lenient treatment from the government. We do not see why the motives of Mr. Dadinis should matter, however, as long as the defendant's side of the conversation was voluntary. In any event, there is no indication here that Dadinis was pressured or threatened if he did not cooperate. The admission of the tapes did not constitute reversible error.

The defendant also argues that she was denied any opportunity to cross-examine Mr. Dadinis and her Sixth Amendment right to confront the witnesses against her was thus violated. This contention is also without merit. The district court explicitly charged the jury not to take Dadinis' statements as true and to consider them only for the purpose of placing Ms. Enriques' statements in context. Because Mr. Dadinis' statements were not offered for the truth thereof, there is no hearsay or confrontation problem. See *United States v. Hathaway,* 798 F.2d 902, 904-05 (6th Cir. 1986).

The defendant further argues that the court erred in admitting testimony by co-defendant Tommy Thompkins that Mr. Dadinis had mentioned "Nelda" as his source and said that she was owed $17,500 for cocaine. The defendant argues that this was error because the statement was not made in furtherance of the conspiracy and therefore does not meet the hearsay exception of Rule

801(d)(2)(E), Fed. R. Evid.[3] This contention likewise lacks merit. The statement, which came within the time frame of the conspiracy, was made to apprise Thompkins of the identity of the source and the credit arrangement that existed with her. This was in furtherance of the conspiracy, so the co-conspirator statement exception to the hearsay rule applies.

D. Validity of the Search Warrant

The defendant argues that the drugs seized in the search of her house should have been suppressed because the search warrant did not list drugs among the items to be seized. The government responds that omission of the term "contraband" or the like was simply a "typographical error." Be that as it may, we believe that the district court's ruling can be upheld on other grounds.

The contraband seized in this case came within the plain view doctrine since it was immediately visible during the legal search of Ms. Enriques' house and its incriminating character was apparent to the agents. See *Arizona v. Hicks*, 480 U.S. 321, 326-27 (1987). The search would not have been conducted any differently had the police included "contraband" among the items to be seized. See *Horton v. California*, 496 U.S. 128, 139 (1990).

In *Horton*, a police officer investigating an armed robbery concluded that there was probable cause to

---

[3] "A statement is not hearsay if . . . [t]he statement is offered against a party and is . . . a statement by a coconspirator of a party during the course and in furtherance of the conspiracy."

believe that the proceeds of the robbery were contained in a suspect's residence. Although the officer's affidavit made mention of weapons and proceeds of the robbery, the warrant authorized search only for the proceeds. The search of the residence did not turn up any proceeds, but several guns and other evidence corroborating the statements of witnesses to the crime were found in plain view. The Supreme Court held that the evidence was properly seized because, according to the Court, the discovery of "plain view" evidence does not have to be "inadvertent" to qualify for the exception. *Id.* at 141-42.

The fact that the agents might have guessed (or hoped) that they would find contraband in Ms. Enriques' home during their search for collateral evidence does not render the seizure improper. As long as the contraband was in "plain view" during a legal, reasonable search, and as long as the criminal character of the evidence was immediately apparent, the seizure was proper. The fact that some of the cocaine was found in a box inside a chest of drawers is of no consequence, since it was reasonable to search the drawer for items that were listed on the warrant.

E. Rule 404(b)

Ms. Enriques contends that the court erred in admitting the evidence seized pursuant to the search of her house because it was introduced only to demonstrate her bad character and to show conformity with such character. She further argues that the judge simply admitted the evidence based upon a "laundry list" of exceptions in Rule 404(b), Fed. R. Evid.

Rule 404(b) forbids the introduction of "[e]vidence of other crimes, wrongs, or acts . . . to prove the character of a person in order to show action in conformity therewith." The rule goes on to provide that such evidence "may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. . . . " "The threshold inquiry a court must make before admitting similar acts evidence under Rule 404(b) is whether that evidence is probative of a material issue other than character." *Huddleston v. United States*, 485 U.S. 681, 686 (1988). Once the court determines that the evidence is admissible for a proper purpose, the court must decide whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice. Rule 403, Fed. R. Evid.; *United States v. Blankenship*, 775 F.2d 735, 739 (6th Cir. 1985).

Ms. Enriques contends that the government did not adequately set forth any permissible purpose for the evidence. The government did, however, offer fairly detailed reasons as to why the evidence might be probative of relevant matters other than character. According to the prosecutor, the evidence would be admissible to show:

> "Opportunity . . . could the defendant have done what the government says she did? Preparation . . . there is a preparation issue in this case, because . . . the evidence goes toward the fact that when the young men, the couriers in Tennessee, . . . were sent back to determine, and they did determine . . . who had prepared the cocaine or the white powder that was later apprehended in Tennessee. . . . Plan, in a conspiracy case, planning is often important, and

> the jurors will want to know . . . whether or not Ms. Enriquez (sic) could have been part of the plan to get the dope from Texas to Tennessee, and of course . . . modus operandi, method of operating, is often at issue in these kinds of cases, because one wants to see whether or not this defendant did things in the manner of the government's proof . . . [i.e.,] many phone calls, . . . a fronting, that is a putting out of the white powder on a credit basis with cash to come back later."

This adequately demonstrates that the evidence was probative of material issues other than character.

The district court gave more than one limiting instruction reminding the jury that Ms. Enriques was not on trial for possession of the cocaine or marijuana found at her house and that the evidence should be considered for the limited purpose "of showing the modus operandi, the way she operated generally." The court then added that the evidence was "admissible for showing . . . motive, opportunity, intent, preparation, knowledge and absence of mistake and accident." In light of these limiting instructions, we do not believe that the evidence had an unduly prejudicial impact on the jury.

F. Jencks Act Violations/Identity of Informant

The defendant also complains that the district court erred in refusing to allow her access to a sealed FBI file maintained by Special Agent Merryman. Following an *in camera* review conducted pursuant to the Jencks Act, 18

U.S.C. §3500, the court ordered the government to produce portions of the file; Ms. Enriques suggests that the remaining materials may have been withheld improperly.

We have reviewed the materials in question, and we are satisfied that they do not raise any flags with respect to the testimony of the government's witnesses; any error in withholding the materials was harmless.

Ms. Enriques also claims that the court erred in refusing to order the government to reveal the identity of an informant who was involved in drug negotiations with her co-defendants. The opportunity to question the informant at trial might have aided her defense, she says, because the informant's testimony could have contradicted the testimony of Agent Merryman or one or more of the co-defendants.

In deciding whether the government should be required to reveal the identity of an informant, the courts must balance the government's interest in protecting the flow of information against the defendant's right to prepare her defense. *Roviaro v. United States*, 353 U.S. 53, 62 (1957). The court may consider such factors as the crime charged, possible defenses to the crime, the potential significance of the informant's testimony, and the safety of the informant. *Id.*

The party seeking disclosure bears the burden of showing that the informant's testimony would provide substantial assistance to the defense. *United States v. Diaz*, 655 F.2d 580, 588 (5th Cir. Unit B Sept. 1981), *cert. denied*, 455 U.S. 910 (1982). This court reviews the district court's ruling on such a question "only to determine whether

there was an abuse of discretion that resulted in substantial prejudice" to the defendant. *United States v. Straughter*, 950 F.2d 1223, 1232 (6th Cir. 1991), *cert. denied*, 112 S. Ct. 1505 (1992). See also *United States v. Sims*, 975 F.2d 1225, 1238-39 (6th Cir. 1992), *cert. denied*, 113 S. Ct. 1617 (1993), where we held that the district court did not abuse its discretion in denying disclosure of an informant's identity when the informant merely served to identify the defendant for an undercover agent.

Having reviewed the FBI file *in camera*, we are satisfied that the "unidentified informant" merely provided Agent Merryman with a tip as to the sale of cocaine to co-defendant Garrett. This information related to a person who was relatively low in the chain of distribution, and the informant's testimony would not have been of any material help to Ms. Enriques.

III.

Ms. Enriques challenges her sentence on several grounds. First, she argues that certain quantities of cocaine not included in the indictment were used impermissibly in the calculation of her offense level under the sentencing guidelines. The commentary to the guidelines says that "[c]onduct that is not formally charged or is not an element of the offense of conviction may enter into the determination of the applicable guideline sentencing range." U.S.S.G. §1B1.3, comment. (backg'd). The commentary also says expressly that quantities of drugs not included in the conviction may be sometimes considered in sentencing:

> "in a drug distribution case, quantities and types of drugs not specified in the count of conviction are to be included in determining the offense level if they were part of the same course of conduct or part of a common scheme or plan as the count of conviction." U.S.S.G. §1B1.3, comment. (backg'd).

As an example, the application notes to the guidelines state that

> "where the defendant engaged in three drug sales of 10, 15, and 20 grams of cocaine, as a part of the same course of conduct or common scheme or plan, subsection (a)(2) [of §1B1.3] provides that the total quantity of cocaine involved (45 grams) is to be used to determine the offense level *even if the defendant is convicted of a single count charging only one of the sales.*" U.S.S.G. §1B1.3, comment. n. 3.

It is clear, therefore, that the guidelines gave the district court authority to consider quantities of cocaine not included in the charge against Ms. Enriques, provided that the cocaine was the subject of a common scheme or plan or part of the same course of conduct with which she was charged. The district court concluded that the cocaine seized from her house met this requirement.

This court has held that "facts used for sentencing must have some minimum indicia of reliability beyond mere allegation. In addition, [the Sixth Circuit] has required that proof presented at sentencing hearings satisfy a preponderance of the evidence standard." See *United States v. Gibson*, 985 F.2d 860, 863 (6th Cir.) (internal quotes and citations omitted), *cert. denied*, 113 S. Ct.

2981 (1993). This court reviews the district court's factual conclusions under a clearly erroneous standard. *Id.*

There was substantial evidence linking Ms. Enriques to the cocaine in question and relating the cocaine to the sort of scheme with which she was charged. The contraband was found in her house, along with records and equipment tending to show that Ms. Enriques dealt in substantial quantities of cocaine. In light of the overwhelming evidence connecting Ms. Enriques to the drugs in question, as well as the evidence that the cocaine was part of a common distribution scheme, we conclude that the court did not err in aggregating the quantities of cocaine for sentencing purposes.

Ms. Enriques also asserts error in the district court's failure to hold an evidentiary hearing before concluding that she was "the organizer and leader of the cocaine distribution activity that at least involved herself and five co-defendants." She relies on *United States v. Bluske*, 969 F.2d 609 (8th Cir. 1992), where the Eighth Circuit reversed a sentence because the district court had relied on the presentence report without any other fact-finding.

The sentencing hearing in the case at bar was an extensive one, however, and the parties were given a full opportunity to argue this issue. Substantial evidence had been presented at trial to show that Ms. Enriques was a leader in the conspiracy. The record on which the district court relied was more than adequate to permit it to arrive at the conclusion it did.

Ms. Enriques also argues – for the first time in her reply brief on appeal – that the fine imposed by the district court was impermissible because it purported to

compensate the government for the costs of her incarceration. Because no specific objection to the assessment of a fine under U.S.S.G. §5E1.2(i) was made in the district court, and because the issue was not timely raised on appeal, we decline to address the merits of this contention.

AFFIRMED.

Case No: 93-5304

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

ORDER

(Filed Sept. 22, 1994)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

NELDA ENRIQUES

Defendant - Appellant

BEFORE: MERRITT, Chief Judge, NELSON and BOGGS, Circuit Judges

Upon consideration of the petition for rehearing filed by the appellant,

It is **ORDERED** that the petition for rehearing be, and it hereby is, **DENIED.**

ENTERED BY ORDER
OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

Trial Exhibit 4

Telephone Conversation – July 2, 1992

Unidentified Male: FBI Houston

Agent Brown: Hi, this is Jennifer with another test. Thank you.

Unidentified Male: Uh-huh, bye-bye.

Agent Brown: This is Special Agent Jennifer Brown. In the room with me is a Task Force Agent, Dickie Smith and also, Harris Andy Dadinis. We are attempting call phone number 855-3569. The time is approximately ten minutes after one. The tape will commence again when he makes that call. One clarification, that's Dickie Williams.

(Dial tone, dialing, phone rings)

Enriquez: Hello.

Dadinis: Nelda.

Enriquez: Huh?

Dadinis: Andy.

Enriquez: Hi.

Dadinis: I'm getting ready to get my car.

Enriquez: Okay.

Dadinis: Okay, I'm, you say they want the party favors?

Enriquez: Yeah.

Dadinis: ***Okay. Hey, I haven't, I've been out of touch for two days. We haven't got hold of those guys yet.***[1]

Enriquez: Uh-huh.

Dadinis: ***To talk to 'em about the money.***

Enriquez: Right.

Dadinis: ***From Mississippi.***[2]

Enriquez: Uh-huh.

Dadinis: And I'm gonna get hold of 'em tomorrow. Okay?

Enriquez: Oh, cause I need to get that immediately, kid.

Dadinis: I know.

Enriquez: I done paid that out, and I'm the one that's in a bind.

Dadinis: ***I know. Well, I'm, I had to get (unintelligible) of prices. See, everybody has been giving me a hard time in my area, because everything's going down to six-fifty, and I've been trying to, you know,***

---

[1] Emphasis has been added to those portions of Mr. Dadinis's conversation that were particularly incriminating to Ms. Enriquez.

[2] Mississippi was significant because Ms. Enriquez had been informed by Mr. Dadinis that the money he owed her had been confiscated by the Mississippi State Police.

get as much as I can. And so it's been, they, I been running into like blocks, but, you know, I've got thirty-nine, and I'm trying to get the . . . Do I owe fifty-eighty or fifty-two eighty?

Enriquez: No, you owe fifty-two eighty.

Trial Exhibit 5
Meeting – July 2, 1992

Enriquez:	Hi, Andy
Dadinis:	Hi, Nelda. What are you doing?
Enriquez:	Trying to get out to get out of here for a little bit.
Dadinis:	Getting burnt?
Enriquez:	No, just coming to the hard, hot hot air.
Dadinis:	Nice and cool.
Enriquez:	Yeah, instead of this (unintelligible) house.
Dadinis:	Do you ever use your pool?
Enriquez:	Yeah.
Dadinis:	Looks like it's (unintelligible). (Dog barking)
Enriquez:	Come on in. (unintelligible)
Dadinis:	(unintelligible)
Enriquez:	Yeah (unintelligible) I had some, but we had to take (unintelligible). (Dog barking) Shhhh. (unintelligible).
Dadinis:	Which one?
Enriquez:	The, the guys with that construction thing.
Dadinis:	No, I tried to beep 'em. I guess they're out on the field, cause sometimes it's hard to get hold of 'em. What's wrong? (Phone rings) Telephone.
Enriquez:	Hello. (Dog barks). No. Okay, okay. (Hangs up phone) No, nothing's wrong. I'm okay (Dog barks)

Dadinis: They lick my hand, but they bark at me. What are you doing with that?

Enriquez: (unintelligible),

Dadinis: Oh, okay. (dog barks) Did you ever, did you ever get rid of those, those 500 for that guy? That real good stuff, remember, that good stuff?

Enriquez: Not yet.

Dadinis: Not yet? Did he want 'em?

Enriquez: They wanted 'em, but the other guy had an accident, a boat accident (unintelligible).

Dadinis: They, they, if he doesn't want 'em, do you want to do 'em around here? I know somebody that might be interested in about three to four hundred.

Enriquez: We've got some of those in Dallas, too. What, they give you the cash, and you come and get 'em or what?

Dadinis: I (unintelligible), uh, ***remember that guy I kept telling you about, Gil, that friend of mine?***

Enriquez: Uh-huh.

Dadinis: ***Well, I talked to him, that if I do it, you know, you got to show him a sample because, remember, you got the sample back from me (unintelligible) show him a sample and (unintelligible) work it. No, no, no, not me. You do that, you'll put me to sleep.***

Enriquez: Oh (unintelligible) clean up, a little lazy. Come on.

Dadinis: Take one, and I need to talk to you. (unintelligible) that thirty-nine hundred, right?

Enriquez: Right.

Dadinis: ***Okay. I do have thirty-nine hundred, but I was waiting for it to get delivered to me. Okay, my friend that went to Galveston, he's a paramedic; he works at UTMB, okay? I went and stayed with him and did it. He got called in on an emergency, okay. So he called, he, he was supposed to come and give it to me today; he said he was going to get off work at midnight, and I didn't want to call you and tell you this so he said he'd get off at midnight and be at my house by two and bring me the money, okay. He's going to bring me probably more than that, because, you know what we have was the eight I had left, so the eight I have left, he's bring all the money for that, so I'll have, I'll be okay. So I owe you fifty . . .***

Enriquez: Two. So what did he have, probably none?

Dadinis: ***None. I know you're going to shoot me.***

Enriquez: Ooooh. (unintelligible) get shorted, man, I'm already out of seventeen thousand dollars.

Dadinis: ***See, I thought it would be better if I came to tell you in person that I would be later . . .***

Enriquez: Yeah, but I need to get that cash before I turn anything loose. (phone rings)

Dadinis: Well, I didn't expect to get anything else.

Enriquez: No. Because, uh, right now, I've got seventeen thousand out on you. Plus those five. (answers phone) Hello. (Dog barks) No, I need to talk to a friend of mine, and I haven't been able to reach him. But I will ask him, and I'll call you and tell you. Bye. (Hangs up phone) I mean, I could have (unintelligible) and seventeen and five. You're looking at about twenty-two (unintelligible). I've gotta have that money (unintelligible) money out.

Dadinis: ***You're, okay, see, the problem I'm having is that everybody in the neighborhood has got it right now, so that's why I went to where I went, and their, all the prices went to six-fifty to six seventy-five.***

Enriquez: I don't think so, because (unintelligible) I don't know where they're getting it unless it's (unintelligible), because it's not what we got.

Dadinis: But you remember, we were going to get, where we, what we were talking about earlier, we might get your stuff and (unintelligible).

Enriquez: Right, and I haven't gotten it, and even if I did get it today, now I don't have the cash, because I've got all my cash tied up.

Dadinis: (unintelligible) price better then.

Enriquez: Right.

Dadinis: And I can compete with everybody.

Enriquez: Well, get that cash in the morning because it was five. That way, you got something to work with for the weekend, and try and get ahold of that guy and, you know, what, he said Friday . . .

Dadinis: Yeah.

Enriquez: . . . we'd have that money?

Dadinis: Uh-huh.

Enriquez: I sure as hell hope so.

Dadinis: ***Ten to fourteen days (unintelligible) got tied up in Mississippi, but the lawyer was supposed to have gone to Mississippi, which he said he did last Monday, not this Monday, Monday before last, tomorrow makes ten working days; he said ten to fourteen working days. I'm going to try to get it.***

Enriquez: Okay, well call me in the morning, get through in the morning, whatever, make sure (unintelligible) you did get that. We do have that nice stuff still. And if I need to get a sample of that down here . . .

Dadinis: Okay.

Enriquez: I can't get those til tomorrow, though.

Trial Exhibit 8
Telephone Conversation – July 8, 1992

Enriquez:	Hello.
Dadinis:	Nelda.
Enriquez:	Hi.
Dadinis:	Andy.
Enriquez:	Hold on, I've got to answer my door, hold it please.
Dadinis:	Okay.
Enriquez:	Hello.
Dadinis:	Okay. I just wanted to get in contact with you.
Enriquez:	What's going on?
Dadinis:	Okay. I made a mistake, but it's not a bad mistake. Okay, the insurance check, I talked to my brother today, I thought it was going to be this Wednesday; he meant next Wednesday.
Enriquez:	And you don't have anything?
Dadinis:	No. And I . . .
Enriquez:	Well, can't they advance you anything?
Dadinis:	***The lawyer? I tried to even get five hundred dollars for me, and they can't do anything right now. I got hold of those construction workers***[3]
	. . .
Enriquez:	Uh-huh
Dadinis:	I finally got in touch with them and . . .

[3] Two other codefendants were construction workers.

Enriquez: Uh-huh.

Dadinis: ***And they, they can't come up with nothing, and they're giving me the run around, kind of, saying their attorney can't get the money or something.***

Enriquez: Hold on, let me catch the other line.

Dadinis: Okay. (pause)

Enriquez: (unintelligible)

Dadinis: Yeah.

Enriquez: Anyway, so what is the, the scoop, what is the bottom line, Andy?

Dadinis: Okay, right now, I don't, I don't have any money.

Enriquez: And what about the guy that owed you those five?

Dadinis: I'm going to go up to Galveston this weekend and look for him again.

Enriquez: Cause this is getting ridiculous, you know week after week. I needed to have that money, I told you and it's really not my problem that you lost it, you know. Fact is, you're still responsible.

Dadinis: Okay. Do you, do you have an attorney or something that I could use that, on these construction workers, to, to see, to take that thing over and see if he can get the, if he can get the money?

Enriquez: Well, you're not going to be able to if they can't prove it. I thought they'd already done all of that and had been squared away.

Dadinis: That's what I thought, but . . .

Enriquez: Well, look why don't you call me about seven o'clock and I'll talk to you then. Let me think about this.

Dadinis: Well, crazy.

Enriquez: Cause I'm busy right now. I got to do some things here real quick. I'm looking for some receipts and stuff.

Dadinis: Okay.

Enriquez: All right?

Dadinis: But is there, if I can't get any, anything, get them, is there any way you can help me try to get some money from 'em?

Enriquez: Sure. That's why I'm telling you. Let me think about how I can arrange this.

Dadinis: Okay.

Enriquez: All right?

Dadinis: All right. Call you back at seven?

Enriquez: Yeah.

Dadinis: Okay.

Enriquez: All right, bye.

Dadinis: Bye.

Trial Exhibit 10
Telephone Conversation – July 9, 1992

Enriquez:	Hello.
Dadinis:	Nelda?
Enriquez:	Yeah.
Dadinis:	Andy.
Enriquez:	Hi.
Dadinis:	I meant to call you back, and I fell asleep.
Enriquez:	Oh, (unintelligible) don't worry.
Dadinis:	Okay. I got hold of the one guy in Galveston.
Enriquez:	Uh-huh.
Dadinis:	***And I told him we'd give him til this weekend to get it together and pay me, or we're going to visit him.***
Enriquez:	So, what did he have to say?
Dadinis:	***He said he'd get it together by Monday, and I said, okay.***
Enriquez:	Okay, cause I need to get that squared in. What about the other apples?
Dadinis:	***Okay, I called them and told them they got the same option, to get ready by Monday, to get anything they can, you know, like a car or anything.***
Enriquez:	Right. Now, you've got it.
Dadinis:	Is that good?
Enriquez:	Yeah. Anything anybody else needs, it's going to be cash up front.

Dadinis: Uh-huh. (pause)

Enriquez: Bring cash.

Dadinis: Okay, but . . . Is there some . . . Is there anything good right now?

Enriquez: Yeah.

Dadinis: But the same price?

Enriquez: No you're looking at seven.

Dadinis: Higher?

Enriquez: Well . . . you know, these packages are higher.

Dadinis: Why?

Enriquez: There ain't any around hardly. I'll go over the six seventy five for you, cash, up front.

Dadinis: What about the green?

Enriquez: That, there's a . . .

Enriquez: That other real expensive stinker . . .

Dadinis: Uh-huh

Enriquez: That's eight and a half.

Dadinis: That went up?

Enriquez: On the animal, skunk.

Dadinis: Oh. Say, how about, is there anything . . .

Enriquez: and the other one is seven and a half.

Dadinis: Okay. Is there anything around six fifty?

Enriquez: No, other than shitty looking shit.

Dadinis: (unintelligible) then.

Enriquez: But, give me a holler if you all need anything or have, you know, anybody that wants to turn loose of case (unintelligible) and get things going.

Dadinis: Okay, on the stinkers, is there plenty of that, or just . . . ?

Enriquez: About sixty.

Dadinis: But on the seven fifty, there is still five hundred.

Enriquez: Less.

Dadinis: Less?

Enriquez: Yeah.

Dadinis: About a couple hundred?

Enriquez: Yeah.

Dadinis: Okay.

Enriquez: All right?

Dadinis: Yeah. Okay, and I'll give you a call when I go out and try to get everything together, and I'll call you by the weekend.

Enriquez: All right.

Dadinis: Okay?

Enriquez: All right.

Dadinis: Bye.

Enriquez: Bye.

Trial Exhibit 11
Telephone Conversation – July 13, 1992

Unidentified Female:	Hello.
Dadinis:	Is Nelda there?
Unidentified Female:	Yeah, may I ask who is calling?
Dadinis:	Andy.
Unidentified Female:	Hold on.
Unidentified Female:	Nelda, Nelda, it's Andy. Hang on.
Enriquez:	Hello.
Dadinis:	Hello.
Enriquez:	What's going on?
Dadinis:	No luck with those guys.
Enriquez:	Well, you need to come over here and bring me some records, and bring me some names and addresses.
Dadinis:	Let me ask you a question, how much do I owe you altogether?
Enriquez:	Twenty-two something.
Dadinis:	How much, how much do I owe you on the last thing?
Enriquez:	Okay, you owed me seventeen two on one, and then you owed me five two on another, so you're looking about twenty-two four.
Dadinis:	***So I owe you seventeen two on that whole package.***

Enriquez: (unintelligible)

Dadinis: And five two on the last package?

Enriquez: Right, and my people are here in town right now, and they want names, numbers, information.

Dadinis: Let's see, Wednesday, I'll get this settled for sure, because . . .

Enriquez: Give me your lawyer's name, and I'll contact him to make sure that that is positive information; then I want somebody's nuts.

Dadinis: ***Okay. I'm trying to keep the lawyer out of it, because I don't want to get anybody all heated up, you know.***

Enriquez: Cause I've waited long enough. I'm not going to have my money tied up on the street on no ass holes.

Dadinis: ***The lawyer went down for those construction workers to Mississippi; he's telling me that he***

. . .

Dadinis: ***. . . And now they're trying to tie the money up.***

Enriquez: Didn't I tell you? I know my shit.

Dadinis: ***Yeah, they won't release it. And then that friend of mine in Galveston, you know, I went down this weekend looking for him; as soon as he . . . I got ahold of him Friday, and I went down there, and he just disappeared on me again. He's trying to avoid me like a plague.***

Dadinis: I want to stay away from those idiots. Your phone keeps beeping. So, okay, Thursday, how about late afternoon, if I come over late afternoon Thursday?

Enriquez: And you'll have all my money?

Dadinis: Yeah.

Enriquez: Promise?

Dadinis: Seventeen two plus five two twenty-two four.

Enriquez: Okay.

Dadinis: Okay.

Enriquez: All right, well, keep in touch, and like I said, if you need anything, things are available, but I have to have cash up front. I'm not gonna go for that anymore, because I, you know, am out a lot of money, and it's keeping my ass (unintelligible).

Dadinis: I don't want to do it like that anymore either, because it puts me . . . I can't sleep; I can't eat. I go chasing everybody, and this is going to be a new policy now on.

Enriquez: Yeah, yeah, me, too.

Dadinis: It's crazy.

Enriquez: No more, they either have cash or they don't get nothing.

Dadinis: Okay.

Enriquez: But if you need anything, like I said, I'm available. We'll work with you, you

know, whatever it's going to take, you know.

Dadinis: Okay.

Enriquez: I'm not upset at you. I'm just upset at these assholes, because, either way you look at it, I think they deserve an ass kicking.

Dadinis: Okay. (unintelligible) I'm going to take care of it somehow, you know, I don't know how, but I'm going to try to get my money back.

Enriquez: Well, now, I've got people that will go get your money, honey.

Dadinis: Yeah, but I don't want to put you in a position.

Enriquez: No, they're not going to involve me, because they don't . . . these people (unintelligible) never know who they are.

Dadinis: Okay. But, I mean, can they get it?

Enriquez: They'll get it, honey. These people are mean.

Dadinis: Okay. I might call you back tomorrow or Wednesday then.

Enriquez: Okay. Like I said, if you need anything holler, and on that other, if it's coming from him, then we don't want anything from them.

Dadinis: (unintelligible)